LIBRARY
SUPREME COURT U.S.

FILED
MAR 4 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1974

NO. 74-1099

VILLAGE OF CAMILLUS and the BOARD OF TRUSTEES OF THE VILLAGE OF CAMILLUS,

Petitioners,

vs.

HENRY DIAMOND, New York State Commissioner of Environmental Conservation,

Respondent.

Petition for a Writ of Certiorari to the Court of Appeals for the State of New York

ALEXANDER J. HERSHA, ESQ.
Counsel for Petitioners
Marine Midland Bank Building
Camillus, New York 13031
Tel. (315) 672-8158

HERSHA & SCOTT, ESQS.
of Counsel.

TABLE OF CONTENTS

	Page
Opinions Below	1
Jurisdictional Statement	2
Question Presented	3
Constitutional Provision Involved	3
Statute Involved	3
Statement of Facts	4
The Constitutional Question Presented	5
The Opinion of Special Term	6
Reasons for Granting the Writ	6
Conclusion	7
APPENDIX A-1 — Order Denying Leave to Appeal to the State of New York Court of Appeals	9
APPENDIX A-2 — Order of Affirmance of the Appellate Division, Fourth Department	10
APPENDIX A-3 — Decision of Hon. Stewart F. Hancock, Jr.	11
APPENDIX A-4 — Order By Consent	15

IN THE

Supreme Court of the United States

October Term, 1974

NO.

VILLAGE OF CAMILLUS and the BOARD OF TRUSTEES OF THE VILLAGE OF CAMILLUS,

Petitioners.

vs.

HENRY DIAMOND, New York State Commissioner of Environmental Conservation,

Respondent.

Petition for a Writ of Certiorari to the Court of Appeals for the State of New York

---

Petitioners, Village of Camillus and the Board of Trustees of the Village of Camillus, pray that a Writ of Certiorari issue to review the Order of the New York Court of Appeals entered on December 20, 1974.

Opinions Below

Before the Court of Appeals, the Petitioners brought a motion for permission to appeal to the Court of Appeals. This motion was submitted for decision on November 4, 1974. The

Respondent duly interposed his affidavit in opposition to the motion for leave to appeal. The Court of Appeals denied Petitioners' motion, by order dated December 20, 1974, entered in the office of the Clerk of the Court of Appeals on the same date, said order reprinted herein as a part of Appendix A (A-1). The Appellate Division of the Supreme Court of the State of New York, Fourth Judicial Department, unanimously affirmed the decision and judgment in the court below, without opinion, by an Order made and filed in the Office of the Clerk of the Appellate Division, Fourth Department, on September 19, 1974. A copy of the Appellate Division Order has also been reprinted (A-2). The decision of the Supreme Court of the State of New York, County of Onondaga, is an unreported opinion, and is set forth in its entirety (A-3).

Jurisdictional Statement

Petitioners commenced this proceeding pursuant to Article 78 of the Civil Practice Law & Rules of the State of New York, seeking an order prohibiting the Respondent from holding a hearing to modify an "Order By Consent" made by the parties to this proceeding on October 4, 1972. The aforesaid Order holds in abeyance a water pollution abatement order affecting Petitioners' municipal sewage system.

This proceeding was commenced in the Supreme Court of the State of New York, Onondaga County, by notice of petition and petition duly served on November 2, 1973. The Respondent appeared and moved to dismiss the petition, which motion was granted by decision of the Supreme Court, Hon. Stewart F. Hancock, Jr., presiding, and said decision is reprinted herein as a part of Appendix A.

Petitioners then appealed from said order dismissing the petition, to the Appellate Division, Fourth Judicial Department. The Fourth Department unanimously affirmed upon the opinion of Special Term, and said order of affirmance is a final order dismissing the proceedings as a matter of law.

Petitioners then moved the Court of Appeals of the State of New York for permission to appeal to said Court of Appeals. The Court of Appeals of the State of New York denied the motion. The jurisdiction of this Court is invoked under 28 USC §1257(3).

Question Presented

1. Whether the "Order By Consent" reprinted here as part of Appendix A (A-4) is a contract made by the parties constitutionally protected under Article I, Section 10 of the Constitution of the United States.

Constitutional Provision Involved

Article I, Section 10, Clause 1: No state shall * * * pass any law impairing the obligation of contracts, * * *

Statute Involved

New York Environmental Conservation Law §17-0303, General Powers and Duties Applicable to Portions of this Article.

* * *

2. The Department shall have administrative jurisdiction to abate and prevent the pollution of waters of the state in the manner herein provided in accordance with the classification of waters adopted by the Department pursuant to §17-0301. * * *

4. The Commissioner is hereby authorized to:

a. Hold any public hearings, receive pertinent and relevant proof from any party in interest who appears at such hearing, compel the attendance of witnesses, make findings of fact and determinations, and assess such penalties therefor as are hereinafter prescribed, all with respect to the violations of the provisions of this Article listed in subdivision 1 of this Section, or the orders issued by the Commissioner;

b. Make, modify or cancel orders requiring the discontinuance of the discharge of sewage, industrial waste or other wastes into any waters of the State in accordance with the provisions of this article listed in subdivision 1 of this Section, and specifying the conditions and time within which such discontinuance must be accomplished.

Statement of Facts

Petitioners are the owners and operators of a municipal sewage collection system and treatment plant. On June 29, 1966, Respondent's predecessor, Hollis S. Ingraham, M.D., Commissioner of Health of the State of New York, signed a water pollution abatement order directing Petitioners to cease and abate all discharges of sewage into the waters of the State in contravention of stream standards unless Petitioners embarked upon a timetable of construction specified in said order. In April 1968, Commissioner Ingraham, by his regional representative, notified Petitioners that the aforesaid order would be held in abeyance and no enforcement would be sought against Petitioners, since Petitioners and the County of Onondaga had joined in a mutual project to build a comprehensive sewage facility which would completely remedy the pollution problem. It was clear to the parties that the Order By Consent dated 1966 could not be complied with by the Village of Camillus acting alone, and that said order could only be complied with upon implementation of a county-wide comprehensive sewage plan. In view of the foregoing, Respondent Henry Diamond, as successor to Commissioner Ingraham, signed an "Order By Consent" dated October 4, 1972. By the 1972 Order By Consent, Petitioners and Respondent agreed that the 1966 Order of Respondent was impossible of performance until the county-wide comprehensive plan was put into effect. Accordingly, the parties agreed to certain interim steps by the 1972 order to be taken by Petitioners, until the comprehensive plan was fully implemented by the County of Onondaga and the Village of

Camillus. The 1972 Order By Consent further set forth that no change in this order would be made or be effective except as may be specifically set forth by written order of the Commissioner upon written application by the Village.

On July 26, 1973, Respondent issued a notice of hearing to Petitioners for the stated purpose of conducting a hearing to set and establish a definite date on or before which all discharges of sewage under the control of Petitioners and into the waters of the State should be abated. The issuance of this notice of hearing was in clear contravention of the contract made by the parties in the form of the Order By Consent dated October 4, 1972. Because of the illegality of the Respondent's act in noticing a hearing for pollution abatement as aforesaid, the Petitioners sought a writ of prohibition to prevent a holding of this hearing, and said proceeding was brought in the Supreme Court of the County of Onondaga in November 1973. Respondent moved to dismiss the petition at Special Term, and said motion was granted. The Appellate Division, Fourth Judicial Department, affirmed the order and decision of Special Term. Petitioners then moved in the Court of Appeals of the State of New York for permission to appeal to the Court of Appeals, said motion being denied by the Court of Appeals.

The Constitutional Question Presented

Upon oral argument of this motion at Special Term of the Supreme Court of the State of New York, Petitioners argued that the parties had made a binding contract when they executed the Order By Consent dated October 4, 1972. It was further argued that this contract obviously involved State action in that the authority to enter into such a contract flowed from Environmental Conservation Law §17-0303(4)(b). Petitioners continued that to allow Respondent to unilaterally breach his contract and seek modification of same, would amount to an unconstitutional application of §17-0303 as aforesaid.

The Opinion of Special Term

The opinion at Special Term dealt only briefly with Petitioners' constitutional contention. Special Term ruled that evidence relating to an abridgement of contract could be offered at the public hearing sought to be held by the Respondent, and subsequently reviewed under the appropriate provision of the Environmental Protection Law and the Civil Practice Law & Rules of the State of New York. Thus, the petition was dismissed as insufficient as a matter of law.

Reasons for Granting the Writ

Under Environmental Conservation Law §17-0303, it cannot be doubted that the Commissioner has the authority to make and modify orders. However, this is not an unfettered right. Since the act of the Commissioner under the relevant State law is unquestionably State action, the act and conduct of the Commissioner is governed by overriding constitutional considerations.

In the case at bar, by the "Order By Consent" dated October 4, 1972, the Commissioner agreed that Petitioners were responsible for certain interim steps pending a final resolution to the municipal sewage problem. The Commissioner undeniably recognized the fact that the Petitioner Village by itself was not able to commence a course of sewage facility renovation which would completely remedy the pollution problem. Accordingly, one of the primary reasons for executing the Order By Consent of October 1972, was to allow the Petitioner to take practical and reasonable measures to abate pollution while the county-wide comprehensive plan was being drafted and ultimately effectuated.

After the making of the administrative order as aforesaid, the Appellate Division, Fourth Judicial Department, decided a case entitled *Matter of Charles v. Diamond*, 42 App. Div. 2d 232. The Commissioner took the opinion of the Appellate Division as a

mandate to correct the sewage problem of Petitioners with all possible speed and to constitute a judicial mandate that the Commissioner was authorized to jettison the order of 1972 toward the end of making a new order. In July of 1973, the Commissioner served notice of a public hearing toward the objective of making a new order which would render completely nugatory the Order By Consent of 1972.

Petitioners submit that the procedure of the New York State Environmental Conservation Department is totally illegal and in contravention of their constitutional right to be free from impairment of their contracts lawfully made. The contract existing between the parties was duly made under authority of New York State law and the Commissioner is not free to enforce a construction of State law which amounts to an unconstitutional application of those provisions of the Environmental Conservation Law which apply to Petitioners' sewage problem. Yet this is what Respondent has decided to accomplish in this case. Respondent seeks to completely ignore the Order of 1972 after Petitioners have placed full reliance upon the terms of that order. By refusing to accept his contractual responsibility, Respondent has deprived the Petitioners of their constitutional right to be free from impairment of their public contract.

Conclusion

The Petitioners and Respondent have entered into a contract proper in all respects and this has never been disputed by Respondent. Respondent seeks to unilaterally abridge that contract and thereby enjoy the benefit of its bargain and at the same time deprive the Petitioners of the consideration legally owing under the same instrument. To allow Respondent to reverse his order of 1972 is to sanction the unconstitutional application of New York State statutes. Because the conduct of

Respondent is so totally arbitrary and inequitable, Petitioners feel that this petition for certiorari should be granted.

Respectfully submitted,

ALEXANDER J. HERSHA, ESQ.
Counsel for Petitioners
Marine Midland Bank Building
Camillus, New York 13031
Tel. (315) 672-8158

HERSHA & SCOTT, ESQS.
of Counsel.

APPENDIX A-1
Order Denying Leave to Appeal to the State of New York Court of Appeals

STATE OF NEW YORK
COURT OF APPEALS

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the Twentieth day of December A. D. 1974.

PRESENT, HON. CHARLES D. BREITEL, *Chief Judge, presiding.*

---

4 Mo. No. 915

Village of Camillus and the Board of Trustees of the Village of Camillus,

Appellants,

vs.

Henry Diamond, New York State Commissioner of Environmental Conservation,

Respondent.

A motion for leave to appeal to the Court of Appeals in the above cause having been heretofore made upon the part of the appellants herein and papers having been duly submitted thereon and due deliberation thereupon had:

ORDERED, that the said motion be and the same hereby is denied with ten dollars costs and necessary reproduction disbursements.

/s/ JAMES M. FLAVIN
Clerk

APPENDIX A-2
Order of Affirmance of the Appellate Division, Fourth Department

502

APPELLATE DIVISION
of the
SUPREME COURT
State of New York
FOURTH JUDICIAL DEPARTMENT

PRESENT: MARSH, P.J., CARDAMONE, SIMONS, GOLDMAN, DEL VECCHIO, JJ.

Village of Camillus and the Board of Trustees of the Village of Camillus, Appellants,

vs.

Henry Diamond, New York State Commissioner of Environmental Conservation, Respondent.

The above named Village of Camillus and the Board of Trustees of the Village of Camillus, petitioners in this proceeding, having appealed to the Appellate Division of the Supreme Court, Fourth Department, from a judgment of the Supreme Court, entered in the office of the Clerk of the County of Onondaga, on the 13th day of December, 1973, and said appeal having been argued by Mr. Roger Scott of counsel for the appellants, and by Mr. Martin H. Schulman of counsel for the respondent, and due deliberation having been had thereon

It is hereby ORDERED That the judgment so appealed from be, and the same hereby is unanimously affirmed without costs upon the Opinion at Special Term, Hancock, J.

Enter.
LESTER A. FANNING

Entered: September 19, 1974

LESTER A. FANNING, *Clerk.*

APPENDIX A-3
Decision of Hon. Stewart F. Hancock, Jr.

STATE OF NEW YORK — SUPREME COURT
COUNTY OF ONONDAGA

VILLAGE OF CAMILLUS AND THE BOARD OF TRUSTEES OF THE VILLAGE OF CAMILLUS,

Petitioners,

against

HENRY DIAMOND, New York State Commissioner of Environmental Conservation,

Respondent.

APPEARANCES:

HERSHA & SCOTT, Esqs.
Attorneys for Petitioners
Marine Midland Bank Bldg.,
Camillus, New York #13031
Roger Scott, Esq. of Counsel

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
The Capitol
Albany, New York #12224
Martin H. Schulman, Assistant
Attorney General of Counsel

HANCOCK, J.:

DECISION

Respondent, the New York State Commissioner of Environmental Conservation, has moved pursuant to CPLR §7804(f) to dismiss the petition which seeks an order prohibiting respondent from holding a duly scheduled public hearing. The stated purpose of the hearing is to receive evidence relevant to the proposed modification of certain prior orders made by the Commissioner relating to pollution abatement in the Village of Camillus and particularly sewage discharge into the waters of Nine Mile Creek.

It is undisputed that the Commissioner has been granted by statute the administrative jurisdiction to abate and prevent the pollution of waters of the State (ECL §17-0303 [2]); and to "[m]ake, *modify* or *cancel* orders requiring the discontinuance of the discharge of sewage, industrial waste or other wastes into any waters of the state * * * * and specifying the conditions and time within which such discontinuance must be accomplished" (ECL §17-1303 [b] [emphasis supplied]); and to hold public hearings and to receive all pertinent and relevant proof with respect to such pollution abatement orders. ECL §17-0303 [4] [a].

Orders made by the Commissioner pursuant to ECL §17-0303, including any modification order that might result from the proposed hearing, are by statute subject to review in a writ of certiorari pursuant to CPLR Art. 78. ECL §17-0909 [2]; see *Matter of Village of Whitehall v. Ingraham*, 31 AD 2d 894.

A writ of prohibition is not a proper remedy where, as here, any order or decision of the Commissioner that may be made in the matter is reviewable in a certiorari proceeding. *Matter of Schuyler v. State University*, 31 AD 2d 273; *Matter of Harris Motors v. Klapp*, 296 N.Y. 242; *Matter of Kent*, 20 Misc 2d 923 (Surrogate's Court, 1959); *Matter of City of New York v. Maltbie*, App. Div. 36 affd. 274 N.Y. 464. As stated by the Appellate Division in *Matter of City of New York v. Maltbie*, supra, at p. 38, prohibition "is not favored by the courts, and is never issued as a matter of right, but only in a sound discretion when there is no other remedy; it is not given for the correction of errors, but only to prevent usurpation of jurisdiction, or the exercise of power in an illegal manner or beyond the jurisdiction conferred; and it will be granted only in extreme necessity when the grievance cannot be redressed by the ordinary proceedings at law, in equity, or by appeal. (*People ex rel. Livingston v. Wyatt*, 186 N.Y. 383, 393. *People ex rel. Childs v. Extraordinary Trial Terms*, 228 id. 463, 468; *People ex rel. Cuvillier v. Haggerty*, 238 id. 621.)"

Furthermore, assuming for the purposes of this motion the truth of the allegations in the petition, it must be held insufficient on its face in that there is no showing of extreme necessity for the order or that petitioners will suffer any irreparable injury if the hearing is not prohibited. *Matter of Brandenburg v. Court of General Sessions*, 189 Misc. 7 affd. 272 AD 1013. See also *Matter of Seventh Day Adventists v. Commission on Human Rights*, 27 NY 2d 898; *Matter of Hodes v. Helman*, 19 AD 2d 603, (1st Dept., 1963) and *Richardson v. Hudson*, 9 AD 2d 861 (4th Dept., 1959). Instead, the petition sets forth facts and arguments dealing with the question of whether the respondent's prior order of October 4, 1972 can or should be modified including whether the Commissioner is bound by it as a "duly executed contract" and thereby precluded from making any modification. Such contentions and the evidence relating thereto may be offered at the hearing, made a part of the record,

and judicially reviewed, if petitioners are so minded, pursuant to ECL §17-0909 (2) and CPLR Art. 78.

The Commissioner, even if in some way limited by the prior order of October 4, 1972, as contended, could not legally have divested himself of the jurisdiction and power specifically granted to him by the legislature to hold the hearing in question and to take such action in the matter as may be legal and proper. *Matter of Rochester Transit Corp. v. Pub. Serv. Comm.*, 271 App. Div. 406, 411 (3rd Dept., 1946), lv. to appeal den., 296 N.Y. 1061 (1947). See *Matter of Campo v. Feinberg*, 279 App. Div. 302 (3rd Dept., 1952), affd. without op. 303 N.Y. 995 (1952) holding that the Public Service Commission could not legally be estopped by its prior acquiescence and inconsistent conduct from exercising its statutory authority to regulate practices and rate classifications of public utilities; and see also *Matter of Richardson Employment Agency v. New York State Division of Human Rights*, 40 AD 2d 585, (4th Dept., 1972).

Since no facts are shown which would warrant the granting of the relief requested, even in the exercise of the Court's discretion, the motion is granted.

Submit order.

STEWART F. HANCOCK, JR.
Justice of the Supreme Court

Dated at Syracuse, New York

December 4, 1973

APPENDIX A-4
Order By Consent

STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of Alleged Violations of Article 12 of the Public Health Law,

VILLAGE OF CAMILLUS AND THE BOARD OF TRUSTEES OF THE VILLAGE OF CAMILLUS,

Respondents.

CASE #1244

A previous Order having been issued by the Commissioner of the Department of Health dated June 29, 1966, and

Said Order having contained certain requirements that were impossible of performance by reason of the fact that the Comprehensive Sewage Plan for Nine Mile Creek Drainage Basis was not put into operation, and for other reasons making performance impossible, and

Interim steps being necessary to effect compliance with the Public Health Law and the rules and regulations promulgated thereunder, and

Respondents and the Department of Environmental Conservation having agreed upon such interim steps until the Comprehensive Plan is effectuated and becomes reality, and

Respondents having waived a public hearing and consented to the issuing and entering of this Order, and respondents having agreed to be bound by the provisions, terms, and conditions contained herein, and

It appearing to the Commissioner of Environmental Conservation that it is in the best interests of the people of the State to modify the Order dated June 29, 1966, and to issue a new Order,

NOW, it is hereby:

ORDERED:

1. THAT any provisions of the Order dated June 29, 1966 which are inconsistent with the following are hereby declared null and void.

2. THAT Respondents, immediately upon service of a conformed copy of this Order, cease and abate and thereafter keep abated all discharges by them, or through facilities under control of Respondents, of sewage or industrial wastes or other wastes or of any effluent thereof into the waters of the State in contravention of standards duly adopted and assigned for, and to the receiving of affected waters, or be bound as hereinafter provided:

A. On or before October 15, 1972 complete removal and legal disposal of all sludge, grit and other sediment from the Imhoff tank of the Camillus Village sewage treatment plant.

B. On or before September 15, 1972, after consultation with the Regional Office of the New York State Department of Environmental Conservation, initiate and thereafter continue a program including analyses of influent to and effluent from said plant for settleable solids and monthly analyses for suspended solids and biochemical oxygen demand, said program to be approved by the Department of Environmental Conservation.

C. On or before September 15, 1972 cause repair and/or replacement of the baffles of said Imhoff tank to be completed.

D. On or before October 1, 1972 engage an engineering consultant or consultants for a study of and recommendations for elimination of excessive groundwater and stormwater infiltration into the Village of Camillus sewage collection system.

E. On or before June 1, 1973 submit to said Regional Office an approvable engineering report of a program and plans for elimination of excessive stormwater and groundwater from such collection system.

F. Within 60 days after approval by the Department of Environmental Conservation the respondents will initiate and thereafter diligently pursue to completion implementation of such infiltration elimination program, within the legal and financial limitations imposed by law.

G. On or before October 1, 1973 submit to said Regional Office a summary of the repairs and improvements made to said collection system to prevent excessive infiltration, and respondent will report annually thereafter.

3. THAT as consideration for the issuing and entering of the Order herein by consent and as consideration for the Department's forebearance from initiating a penalty action for violations the Respondent shall within fifteen (15) days of the service of a conformed copy of this Order post or deposit with the Department a financial undertaking in cash, check, or other negotiable instrument, in acceptable form, or a surety bond issued by a company licensed to do business in the State of New York, in a form acceptable to the Department, in the amount of (TEN THOUSAND DOLLARS ($10,000.00)---) payable to the Commissioner of Environmental Conservation upon condition that upon ten (10) days written notice to the Respondent said financial undertaking shall be forfeited and paid to the Commissioner if at any time the Respondent fails to comply with any or all of the provisions of this Order, provided however, that the Respondent has not requested in writing and been granted a

prior formal modification of said provisions by the Commissioner of the Department; and provided further, that the forfeiture or payment of said amount shall in no way prejudice the right of the Commissioner to institute such other and further action as he may deem necessary in order to insure full compliance with this Order, the Public Health Law and the Environmental Conservation Law of the State of New York.

Provided further, however, that said financial undertaking shall be returned to the Respondent upon written request to the Department with proof acceptable to the Department to establish that the Respondent has complied fully with the provisions of this Order.

4. THAT no change in this Order shall be made or be effective except as may be specifically set forth by written order of the Commissioner upon written application by the Respondent for the relief sought.

5. THAT the provisions, terms and conditions of this Order shall be deemed to bind the Respondent, and its agents, servants, employees, successors and assigns and all persons, firms and corporations acting under, or for it, including but not limited to those who may carry on any or all of the operations now being conducted by Respondent, whether at the present location or at any other location in the State of New York or who shall have any interest, financial or otherwise, in the conduct of such operations.

DATED: October 4, 1972

/s/ HENRY L. DIAMOND
HENRY L. DIAMOND, Commissioner
New York State Department of
Environmental Conservation

TO: Alexander L. Heresa, Esq.
Attorney for Respondents
Second Floor
Marine Midland Bank Bldg
Camillus, N. Y. 13031

CONSENT BY RESPONDENT

Respondent hereby consents to the issuing and entering of the foregoing Order without further notice and waives its right to a hearing herein and agrees to be bound by the provisions, terms and conditions contained therein.

Village of Camillus
BY /s/ MORRIS A. RAICHLIN
TITLE Mayor
DATE September 12, 1972

Spaulding Law Printing
Syracuse, New York

(7085)

LIBRARY
SUPREME COURT U. S.
(F-25)

Supreme Court, U. S.
FILED
APR 4 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1974

No. 74-1099

VILLAGE OF CAMILLUS and the BOARD OF TRUSTEES OF THE VILLAGE OF CAMILLUS,

Petitioners,

against

HENRY DIAMOND, New York State Commissioner of Environmental Conservation,

Respondent.

BRIEF IN OPPOSITION TO GRANTING CERTIORARI

LOUIS J. LEFKOWITZ
Attorney General of the State
of New York
Attorney for Respondent
The Capitol
Albany, New York 12224
Tel. No. (518) 474-8096

RUTH KESSLER TOCH
Solicitor General of the State of New York

STANLEY FISHMAN
MARTIN H. SCHULMAN
Assistant Attorneys General of the State of New York
of Counsel

BATAVIA TIMES, APPELLATE COURT PRINTERS
A. GERALD KLEPS, REPRESENTATIVE
BATAVIA, N. Y. 14020
716-343-8457

TABLE OF CONTENTS.

	Page
Statement	1
Question Presented	2
Facts	2
Relevant Statutes, Rules and Regulations	4
Argument	4
Point I. Petitioners' application to this Court is premature, the Courts of New York not having reached, nor having been acquired to reach, the alleged constitutional question sought to be raised by petitioners.	5
Point II. The 1972 order entered into on consent by petitioners and respondent is not a contract within the meaning of Article I, Section 10, Clause 1, of the Federal Constitution.	6
Conclusion	8
Appendix A—Relevant Statutes	A1
Appendix B—42 Appellate Division Reports, 2d Series	A5
Appendix C—Notice of Hearing	A12

TABLE OF CASES CITED.

Campo Corp., Matter of v. Feinberg, 279 App. Div. 302 (3rd Dept., 1952), affd. without op. 303 N. Y. 995 (1952)	7
Charles, Mtr. of v. Diamond, 42 A D 2d 232 (4th Dept., 1973)	3
Fahey, *Ex Parte*, 332 U. S. 258	6
Greater N. Y. Corp. of Seventh Day Adventists, Matter of v. Commission on Human Rights of City of N.Y.,	

Page

27 N Y 2d 898 (1970); mot. for reargument den. 28 N Y 2d 718 (1971) 5, 6

Rochester Tr. Corp., Matter of v. Public Serv. Comm., 271 App. Div. 406 (3rd Dept., 1946) mot. for lv. to app. den. 296 N.Y. 1061 (1947) 7

IN THE

Supreme Court of the United States

October Term, 1974

No. 74-1099

VILLAGE OF CAMILLUS and the BOARD OF TRUSTEES OF THE VILLAGE OF CAMILLUS,

Petitioners,

- against -

HENRY DIAMOND, New York State Commissioner of Environmental Conservation,

Respondent.

BRIEF IN OPPOSITION TO GRANTING CERTIORARI

Statement

Henry Diamond, New York State Commissioner of Environmental Conservation[1] (hereinafter referred to as "respondent"), submits this brief in opposition to the application of petitioners, Village of Camillus and the Board of Trustees of the Village of Camillus (hereinafter referred to as "petitioners"), to review the order of the Court of Appeals of the State of New York denying petitioners leave to appeal

---

[1] At the time that this proceeding was commenced Henry Diamond was Commissioner of Environmental Conservation of the State of New York. Ogden R. Reid is now the Commissioner of Environmental Conservation of the State of New York.

from an order of the Appellate Division of the Supreme Court of the State of New York, Fourth Judicial Department, which affirmed the order of the Supreme Court of the State of New York (Special Term, Onondaga County) dismissing their petition seeking an order to prohibit respondent's holding of a statutory water pollution abatement hearing.[2] Thereafter, petitioners applied to the Court of Appeals of the State of New York for leave to appeal from the order of the Appellate Division and such application was denied.

Question Presented

Is there a substantial Federal constitutional question raised, warranting the granting of petitioners' application for a writ of certiorari to review the dismissal by the Courts of New York of petitioners' application for an order to prohibit respondent's holding of a statutory hearing to consider modification of a water pollution abatement order, when the contention sought to be raised in this Court by petitioners—that respondent has contracted away his statutory authority to modify the water pollution abatement order involved—has not been passed upon by the Courts of New York, which have held that this objection is premature since it may be raised in the administrative proceeding and thereafter judicially reviewed?

Facts

Petitioners are the owners and operators of a municipal sewage collection system and treatment plant. On June 29, 1966, respondent's predecessor, Hollis S. Ingraham, M.D., Commissioner of Health of the State of New York, issued a

[2] In effect, petitioners seek *certiorari* to review the order of affirmance made by the Appellate Division.

water pollution abatement order which directed petitioners to cease and abate all discharges of sewage or industrial wastes or other wastes or effluents into the waters of the State of New York in contravention of stream standards adopted and assigned to the receiving waters by July 11, 1966, unless petitioners embarked upon a timetable of construction therein specified.

On October 4, 1972, respondent Diamond issued an order consented to by petitioners (Petitioners' brief, Appendix A-4, pp. 15-19) which modified the original 1966 order by substituting, for the construction timetable contained in the original order, a timetable for making certain enumerated repairs and implementing an infiltration elimination program.

On July 6, 1973, in a proceeding instituted by one William J. Charles against petitioners and respondent herein, seeking judicial review of respondent Diamond's denial of Charles' application for a permit to extend to his property the sewer lines of the Village of Camillus (*Mtr. of Charles* v. *Diamond, et al.*, 42 A D 2d 232 [4th Dept., 1973]) (Appendix "B" attached hereto), the Appellate Division of the Supreme Court of the State of New York, Fourth Judicial Department, rendered a decision holding that petitioners herein had not complied with respondent's aforesaid order. The Appellate Division directed respondent herein to act to require petitioners, Village of Camillus and the Board of Trustees of the Village of Camillus, to comply with the aforementioned order and to "rectify an unhealthy, polluting condition which admittedly exists." (Appendix, p. A9).

On July 26, 1973, respondent issued a Notice of Hearing to petitioners (Appendix "C") "* * * for the purpose of receiving any evidence relevant to such modifications of said orders as should properly be made." The Notice of Hearing recited, among other things, that it appeared necessary to

establish a definite date on or before which all polluting discharges of sewage or wastes or effluents thereof by petitioners into the waters of the State shall be abated (Appendix, p. A13).

Petitioners then sought an order in the nature of prohibition, to prevent the holding of the hearing, serving a notice of petition and petition, returnable at Special Term, Supreme Court of the State of New York, Onondaga County, on November 26, 1973. Prior to the return date of petitioners' aforesaid application, respondent moved to dismiss petitioners' application and this motion was granted.

Petitioners appealed from the order and judgment dismissing the petition, which order and judgment was affirmed on appeal by the Appellate Division of the Supreme Court of the State of New York, Fourth Judicial Department. Petitioners then sought, and were denied, leave by the Court of Appeals of the State of New York to appeal from the Appellate Division order to that Court.

They then petitioned this Court for a "Writ of Certiorari to the Court of Appeals for the State of New York".

Relevant Statutes, Rules and Regulations

In accordance with Rule 40, the relevant statutes, rules and regulations have been set forth in Appendix "A" of this brief.

ARGUMENT

No substantial Federal constitutional question is presented since (a) petitioners' application to this Court is premature, the Courts of New York not having reached, nor having been required to reach, the alleged constitutional question sought to be raised by petitioners; and (b) the 1972 order on consent entered into by petitioners and respondent is not a contract

within the meaning of Article I, Section 10, Clause 1, of the Federal Constitution.

POINT I

Petitioners' application to this Court is premature, the Courts of New York not having reached, nor having been required to reach, the alleged constitutional question sought to be raised by petitioners.

The well established law of the State of New York holds that an applicant for an order prohibiting an administrative proceeding must establish (a) that the administrative agency is proceeding in excess of its jurisdiction, (b) that judicial review is not available to correct possible administrative error, and (c) that irreparable injury would be sustained if the proceeding were not prohibited. *Matter of Greater N. Y. Corp. of Seventh Day Adventists* v. *Commission on Human Rights of City of N. Y.*, 27 N Y 2d 898 (1970); mot. for reargument den. 28 N Y 2d 718 (1971).

In the instant case, the New York Court of first impression, the Supreme Court, Special Term, held that even assuming that the allegations of the petition were true (for the purposes of the motion), the petition was legally insufficient in that it did not show extreme necessity for the order or irreparable injury if the proceeding was not prohibited.

In dismissing the petition, Special Term specifically stated that the question of whether respondent

> "is bound by its 'duly executed contract' and thereby precluded from making any modification." (Petition, p. 13.)

is not lost to petitioner as

> "Such contentions and the evidence relating thereto may be offered at the hearing, made part of the record, *and*

judicially reviewed" (Emphasis ours). (Petiton, pp. 13, 14.)

Thus, the Courts of New York held that, in the event the hearing resulted in issuance of a modified order, the judicial review provided by Environmental Conservation Law, § 17-0909(2), would include review of the order of modification as well as any objection that petitioner chose to raise as to respondent's capacity to hold the hearing. Thus, in the event of an order which petitioners might deem adverse to their interests, petitioners' right to complete legal redress is preserved.

Petitioners having failed to establish that they have no other legal redress or that they would be subject to irreparable harm if the hearing is not prohibited, have not, as a matter of New York State law, established any legal basis for the writ of prohibition sought in their petition. *Matter of Greater N. Y. Corp. of Seventh Day Adventists* v. *Commission on Human Rights of City of N. Y.*, 27 N Y 2d 898 (1970); mot. for reargument den. N Y 2d 718 (1971), *supra; cf. Ex Parte Fahey*, 332 U. S. 258.

POINT II

The 1972 order entered into on consent by petitioners and respondent is not a contract within the meaning of Article I, Section 10, Clause 1, of the Federal Constitution.

In October, 1972, respondent determined that petitioners were unable to comply with the water pollution abatement order issued in 1966 and that the water pollution from petitioners' sewage plant had not been minimized. Respondent, being faced with the statutory mandate to abate water pollution had but two alternatives. The first alternative was to schedule and hold a public hearing and issue an order fix-

ing a pollution abatement schedule, while the second alternative was to reach amicable agreement on the terms of, and issue an order on consent to achieve the same purpose. The authority for respondent to issue either type of order stems from the same statutory source (ECL 17-0303[4][b])[3] and there is no difference between either order, as an order on consent has the same effect as one issued after a public hearing. 6 NYCRR Part 658(c)[4].

Petitioners, in their petition for certiorari, concede that respondent has authority to modify a water pollution abatement order (Pet., p. 6), but contend, without citation of statute or case authority, that by issuing an order on *consent*, respondent "contracted away" his statutory authority to modify this order.

Since respondent would not have the capacity to enter into an agreement in which he divests himself of his statutory authority, it follows that the consent order herein cannot be construed as a contract by which he divested himself of his statutory authority to modify the instant water pollution abatement order. *Matter of Rochester Tr. Corp.* v. *Public Serv. Comm.*, 271 App. Div. 406 (3rd Dept., 1946) mot. for lv. to app. den. 296 N. Y. 1061 (1947), *supra; Matter of Campo Corp.* v. *Feinberg*, 279 App. Div. 302 (3rd Dept., 1952), affd. without op. 303 N. Y. 995 (1952).

In rejecting petitioners' contention, the Courts of New York State have followed the State's well established law that an administrative official has no capacity to divest himself of authority devolved upon him by the Legislature. *Matter of Rochester Tr. Corp.* v. *Public Serv. Comm., supra; Matter of Campo Corp.* v. *Feinberg, supra.*

---

[3] Citation references to "ECL" are to the New York State Environmental Conservation Law.

[4] Citation references to "NYCRR" are to the Official Compilation of Codes, Rules and Regulations of the State of New York.

This was in accord with "Hornbook" law that an essential element of any contract is that the parties have capacity to enter into same. The respondent, being a State official with only the authority prescribed by statute (New York's Water Pollution Control Law [ECL, Art. 17]), the capacity of the respondent to enter into any "contract" must of necessity be derived solely from his statutory authority to issue water pollution abatement orders.

CONCLUSION

The application for Certiorari should be denied.

Dated: March 31, 1975.

Respectfully submitted,

LOUIS J. LEFKOWITZ,
Attorney General of the State
of New York,
Attorney for Respondent,
The Capitol,
Albany, New York 12224,
Tel. No. (518) 474-8096.

Ruth Kessler Toch,
Solicitor General of the
State of New York,

Stanley Fishman,
Martin H. Schulman,
Assistant Attorneys General of the
State of New York,

of Counsel.

APPENDIX A

RELEVANT STATUTES

New York State Environmental Conservation Law[5]

The legislative policy with respect to pollution control is found in Environmental Conservation Law, § 1-0101, entitled "Declaration of policy", which provides, in pertinent part, as follows:

> "1. The quality of our environment is fundamental to our concern for the quality of life. It is hereby declared to be the policy of the State of New York to conserve, improve and protect its natural resources and environment and control water, land and air pollution, ***"

The specific article of the Environmental Conservation Law directed to the abatement of water pollution is Article 17, the Water Pollution Control Law, the relevant sections of which are as follows:

> "§ 17-0101. Declaration of policy
>
> "It is declared to be the public policy of the state of New York to maintain reasonable standards of purity of the waters of the state consistent with public health and public enjoyment thereof, the propagation and protection of fish and wildlife, including birds, mammals and other terrestrial and acquatic[1] life, and the industrial development of the state, and to that end require the use of all known available and reasonable methods to prevent and control the pollution of the waters of the state of New York.
>
> "1. So in original. Probably should read 'aquatic.' "
>
> "§ 17-0103. Statement of purpose—provides as follows:
>
> "It is the purpose of this article to safeguard the waters of the state from pollution by preventing any new

[5] All references to statutes, unless otherwise specifically noted are to statutes enacted by the Legislature of the State of New York.

pollution and abating pollution existing when the predecessor of this chapter was enacted, under a program consistent with the declaration of policy stated in section 17-0101."

The statutory authority of the Commissioner of Environmental Conservation to hold water pollution abatement hearings, to adopt rules and regulations governing such hearings, or to make, modify or cancel administrative orders, is found in § 17-0303, which reads, in pertinent part, as follows:

"§ 17-0303. General powers and duties applicable to portions of this article

* * *

"2. The department shall have administrative jurisdiction to abate and prevent the pollution of waters of the state in the manner herein provided in accordance with the classification of waters adopted by the department pursuant to section 17-0301.

"3. The department, acting through the commissioner may, from time to time, adopt, amend, or cancel administrative rules and regulations governing the procedure to be followed with respect to hearing, filing of reports, the issuance of permits, and all other matters relating to procedure, and generally, may make such administrative rules and regulations, and do and perform any and all acts, not inconsistent with the provisions of this article * * *. Such rules and regulations, before becoming effective, shall be filed with the secretary of state for publication in the 'Official Compilation of Codes, Rules and Regulations of the State of New York' published pursuant to section 120 of the Executive Law.

"4. The Commissioner is hereby authorized to:

"a. Hold any public hearings, receive pertinent and relevant proof from any party in interest who appears at such hearing, compel the attendance of wit-

nesses, make findings of fact and determinations, and assess such penalties therefor as are hereinafter prescribed, all with respect to the violations of the provisions of this article listed in subdivision 1 of this section, or the orders issued by the commissioner;

"b. Make, modify or cancel orders requiring the discontinuance of the discharge of sewage industrial waste or other wastes into any waters of the state in accordance with the provisions of this article listed in subdivision 1 of this section, and specifying the conditions and time within which such discontinuance must be accomplished."

The Commissioner's authority to investigate and inquire into any alleged water pollution is set forth in Environmental Conservation Law, §17-0905, which provides (in pertinent part):

"§17-0905. Proceedings before the commissioner

"1. The commissioner may, on his own motion, investigate or make inquiry, in a manner to be determined by him, as to the condition of any of the waters of the state and as to any alleged act of pollution or omission or failure to comply with any provisions of titles 1 to 11, inclusive, or title 19 of this article.

"2. Whenever it shall appear to the commissioner, after investigation, that there has been a violation of any of the provisions of titles 1 to 11, inclusive, or title 19 of this article, he shall give written notice to the alleged violator or violators setting forth any thing or act done or omitted to be done or claimed to be in violation of any such provisions, and requiring that the matters complained of be correct, or that the alleged violator appear in person or by attorney before the commissioner or his duly designated representative, at the time and place in said notice specified, and answer the charges complained of."

Appendix A

All determinations of the Commissioner of Environmental Conservation are subject to review by the courts. Section 17-0909(2) of the Environmental Conservation Law provides:

> "2. All orders or determinations of the commissioner or the department shall be subject to review as provided in article 78 of the Civil Practice Law and Rules. * * *"

RELEVANT RULES AND REGULATIONS

The rules and regulations relevant to this application, adopted by the Commissioner of Environmental Conservation, are published in Volume 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York, as Part 658 (6 NYCRR Part 658). Rule 658.13 relates to consent orders and the relevant portions thereof are as follows:

> "658.13 Stipulations and consent orders. (a) At any time prior to the issuance and service of the notice of hearing in any proceeding, the commissioner, in his discretion, may enter into a stipulation with a prospective respondent whereby the latter admits the material facts and agrees to discontinue the acts or practices which are violative of the act. Such stipulation shall be admissible as evidence of such acts and practices in any subsequent proceedings against such person before the commissioner.
>
> * * *
>
> (c) Upon a record composed of the notice of hearing and the stipulation or agreement consenting to the order, the commissioner may enter the order consented to by a respondent, which shall have the same force and effect as an order after hearing."

APPENDIX B

Hence, in this case I would direct that an *in camera* hearing be held in connection with the new trial, in order to determine whether disclosure should be required. The Trial Justice after obtaining the facts, is in a far better position to make the decision than we are on this record. I therefore concur in the reversal and the direction of a new trial, but dissent from the direction for disclosure without an *in camera* hearing, conducted under the conditions stated herein.

MUNDER, GULOTTA AND CHRIST, JJ., concur with SHAPIRO, J., HOPKINS, Acting P.J., concurs in the refersal and the direction of a new trial, but dissents from the direction for disclosure without an *in camera* hearing, with an opinion.

Judgment of the Supreme Court, Kings County, rendered June 11, 1971, reversed, on the law, and new trial ordered.

In the *Matter of William J. Charles,* Appellant, v. *Henry Diamond,* as Commissioner of Environmental Conservation, *et al.,* Respondents.

Fourth Department, July 6, 1973.

Health—water pollution control—order to complete new sewage treatment facility—petition states cause of action in alleging petitioner unable to develop apartment project on land requiring connection to village sewage system where village was enjoined by New York State Department of Environmental Conservation from making new sewer extensions until it completed new treatment facility—village has not complied and has not been forced to comply for seven years—cause of action also stated on constitutional grounds.

Appendix B

1. Petitioner, who wishes to build an apartment project on land which, by law, must be connected to village sewers, sought judicial review of the actions of respondent New York Department of Environmental Conservation which has enjoined any new extensions of the sewer system of respondent Village of Camillus. The department's order, issued seven years ago, required the village to plan and complete a sewage treatment facility to cure a pollution problem, but the village has not complied and no steps have been taken to enforce the order. Although respondents may not be told to perform their responsibilities, they may be told that they must act. The combination of the village's right under its police powers to require that there be a village sewer connection and the department's right to restrict the village, frustrates the petitioner's right to demand that his property be served by the village sewer system. The motion to dismiss the petition should be denied.

2. There is also a cause of action stated on constitutional grounds. Police powers may not be used to restrict the use of petitioner's property indefinitely without a corresponding benefit to the public. The petitioner is not contributing to the pollution, but is penalized for the lack of compliance by the village.

Matter of Charles v. *Diamond*, 71 Misc 2d 440, reversed.

Appeal from a judgment of the Supreme Court at Special Term (FRANCIS R. MORAN, J.), entered September 27, 1972 in Onondaga County, dismissing the petition.

MTR. OF CHARLES v. DIAMOND [42 A D 2d 232]

Oot, Greene, Setright, Hershdorfer & Sharpe (*Victor J. Ciabotti* of counsel), for appellant.

Appendix B

Louis J. Lefkowitz, Attorney-General (*Martin H. Schulman, Ruth Kessler Toch* and *Stanley Fishman* of counsel), for Henry Diamond, respondent.

Eli Gingold, County Attorney (*Hugh C. Gregg, II,* of counsel), for William Harris, respondent.

Alexander J. Hersha for Village of Camillus, respondent.

SIMONS, J. This is an appeal from a judgment which granted respondents' motion to dismiss this article 78 proceeding on the ground that the petition fails to state a cause of action. On review we assume the truth of all the statements contained in the pleading and consider them in the light most favorable to the pleader (*Matter of Hassett* v. *Barnes,* 11 A D 2d 1089).

Petitioner alleges that he owns land in the Village of Camillus, New York. He wishes to build an apartment project on it and the Village Board has approved the construction and authorized the Mayor to improve the connection of the project to the village sewer system. However, since 1966 the respondent, New York State Department of Environmental Conservation (and its predecessor) has enjoined new extensions of the village sewer system because the sewage treatment facilities are inadequate and the village is discharging pollutants from its sewer system into the waters of Nine Mile Creek. The order of 1966, predicated upon a stipulation of the material facts by the parties, required a treatment facility to be completed by 1969. Correspondence between the department and the village, set forth in the record, refers to the "long-standing pollution" problem and the village's obligation to "minimize" it by temporary measures while preparing a new facility to correct the situation. Petitioner claims that the village has done nothing and that at this time it has no concrete plans to comply with the order. The department has not enforced the construction provisions of the or-

der and states that that part of the order is "in abeyance." Nevertheless, until the village complies, the Department of Environmental Conservation refuses to approve petitioners' application to connect to the village sewer system.

The petitioner initiated this proceeding claiming that the actions of the respondents are illegal and arbitrary and result in the unconstitutional confiscation of his property. The Department of Environmental Conservation, and the County Health Department moved for dismissal claiming that they had no legal obligation to the petitioner that had been abused and that they acted within their statutory authority to regulate pollution of public waters and were properly performing that function by attempting to regulate the municipal sewage outlet which discharges pollutants into Nine Mile Creek by regulating the owner of the system (see 10 NYCRR Appendix 72-B 21). In the alternative, they contend that even if petitioner has standing to challenge these acts, their conduct consisted of legal, discretionary acts not subject to mandamus or review under article 78.

The village moves for dismissal on the grounds that it has not performed any illegal or arbitrary acts. It asserts that it granted petitioner the requested permission to connect with the sewer system and only the State's sanction prevented his use of his property. In any event, it asserts its conduct consisted of legal, discretionary acts not subject to mandamus or review by the courts.

The petition states grounds for relief and the order should be reversed and the motions to dismiss denied.

The petitioner owns land which by law must be connected to village sewers before it may be developed. That restriction is a proper exercise of the village's police powers (*Hutchinson* v. *City of Valdosta,* 227 U.S. 303). However, the converse of

that requirement is that a taxpayer, upon payment of appropriate charges, may demand that his property be served by the sewer system (cf. *Barr* v. *Algon Realty Corp.*, 166 Misc. 177, 183, affd. 255 App. Div. 869, mot. for lv. to app. den. 280 N.Y. 849; and see *People ex rel. Hilliker* v. *Pierce*, 64 Misc. 627; *Matter of Dexter Sulphate Pulp & Paper Co.* v. *Shaver*, 183 Misc. 275 [water supply]; *People ex rel. Bloy* v. *Walker*, 113 Misc. 592 [sidewalks]). Because of the department's order and the failure of the village to comply with that order, petitioner has been denied the right to connect to the sewer system and lawfully to develop his property. Furthermore, even though it is apparent that the village has not complied with the order of 1966, the department has not taken steps to enforce correction of the treatment facilities and contemplates none°.

It may be that the department's use of persuasion and restrictions on expansion is the most advisable course of action to induce compliance by the village under all the circumstances. Certainly we do not suggest that the restraint imposed was improper or that limitations should be placed on the department's statutory powers to control pollution (see ECL, § 17-0303). Be that as it may, when related solely to this case and without the benefit of answering pleadings or proof, the posture respondents have assumed leaves petitioner hopelessly frustrated in any fruitful effort to develop his property.

In short, the village is mandated by a lawfully correct regulatory order to act to rectify an unhealthy, polluting condition which admittedly exists. It has not only failed to comply with the regulatory order but because of that failure it is

---

° It does not appear whether all development in the village has ceased for seven years because of the order, which seems unlikely, or whether the State's prescription on connections has discriminated against only certain property owners.

not able to perform its legal obligation to permit petitioner to connect the proposed developments on his property with the municipal sewer system. Over seven years have passed since that order was issued and it is claimed not that progress towards correction is incomplete but that there has been no progress at all. While the court may not tell these coequal branches of government how to perform their responsibilities in the matter, we may tell them that they must act. The village's problem has been defined and the general requirements for solution are apparent. It is not a matter of choice whether the village will or will not comply with the order of the department. Its officials recognize the validity of the order. If indeed the respondents have no justification for failing to perform the legal duties imposed upon them, then the court should supply the necessary kinetic energy to resolve the problem and order performance. (See *People ex rel. Harris* v. *Commissioners of Land Office,* 149 N.Y. 26.) The petition states a cause of action under article 78.

It also states a cause of action on constitutional grounds. It is axiomatic that the use of private property may be regulated in the public interest and even a total restriction on the use of the property has been tolerated temporarily (see *Matter of Golden* v. *Planning Bd. of Ramapo,* 30 N Y 2d 359). But there is a limit as to how far the police powers may be used to disadvantage interests in private property and "if regulation goes too far it will be recognized as a taking." (*Pennsylvania Coal Co.* v. *Mahon,* 260 U.S. 393, 415; *Arverne Bay Constr. Co.* v. *Thatcher,* 278 N. Y. 222, 231.) The police powers may not be used to restrict the use of petitioner's property indefinitely when the corresponding benefit to the public is negligible or nonexistent. Petitioner has not contributed to the pollution caused by the discharge of sewage but only he and others similarly situated are penalized for the inadequacy of the

sewage treatment facilities. As the Court of Appeals stated in *Westwood Forest Estates* v. *Village of South Nyack* (23 N Y 2d 424, 427): "A municipality has, of course, the power to take appropriate steps to deal with sanitation problems, including those created by inadequate biological treatment of sewage. The instant sanitation problem is, however, general to the community and not caused by the nature of plaintiff's land (see *De Sena* v. *Gulde*, 24 A D 2d 165, 171). It is, therefore, impermissible to single out this plaintiff to bear a heavy financial burden because of a general condition in the community (*De Sena* v. *Gulde, supra; Opgal, Inc.* v. *Burns*, 20 Misc. 2d 803, 806-809, affd. 10 A D 2d 977, affd. 9 N Y 2d 659, mot. to amend remittitur den. 9 N Y 2d 717)."

The judgment should be reversed and the petition reinstated.

DEL VECCHIO, J. P., MARSH, WITMER AND HENRY, JJ., concur.

Judgment unanimously reversed on the law with costs and petition reinstated.

APPENDIX C

State of New York—Department of Environmental Conservation

—o—

In the Matter
of
Alleged Violations of Article 12 of the Public Health Law,

VILLAGE OF CAMILLUS AND THE BOARD OF TRUSTEES OF THE VILLAGE OF CAMILLUS,
Respondents.

Case No. 1244

—o—

NOTICE OF HEARING

It appearing to the Commissioner of Environmental Conservation, after investigation, that the above Respondents are and for many years last past have been discharging effluents of sewage and wastes not having been subjected to effective primary treatment into the surface waters of Nine Mile Creek, which cause conditions in contravention of the standards adopted for such waters all in violation of Article 17 of the Environmental Conservation Law, and that it is now the law of the State of New York that the full discharge of the duties of the Department of Environmental Conservation under and pursuant to said Article 17 requires that the orders of the Commissioner of Health and of the Commissioner of Environmental Conservation duly made and issued in the

above entitled proceeding be modified pursuant to Section 17-0303 of the Environmental Conservation Law to set and establish a definite date on or before which all discharges of sewage or wastes or effluents thereof by the Respondents or through facilities under the control of them or either of them into the waters of the State in violation of such article shall be abated.

TAKE NOTICE that a public hearing will be held in the PERB hearing room at 50 Wolf Road, Town of Colonie, Albany County, New York, before a duly designated Hearing Officer and representative of the Commissioner of Environmental Conservation at 10:00 A.M. o'clock on the 22nd day of August, 1973, for the purpose of receiving any evidence relevant to such modifications of said orders as should properly be made.

TAKE FURTHER NOTICE that you may appear in person or by counsel and introduce any relevant evidence on your behalf, cause witnesses or documentary evidence to be subpoenaed, cross examine witnesses against you and submit proposed findings.

TAKE FURTHER NOTICE that on or before said return day you are required to file a statement setting forth your position and your answer, if any, and the methods, practices and procedures which are being taken to prevent polluting discharges into said waters and your sewers and sewage disposal works and any other information pertinent to the case.

TAKE FURTHER NOTICE that all witnesses will be sworn and that a stenographic record of all testimony and proceedings had on said hearing will be made.

TAKE FURTHER NOTICE that the procedures on said hearing will be governed by statute and case law in such case

made and provided, and particularly, but not exclusively, by said Article 17, and that Part 658 of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York is hereby waived.

Dated: July 26, 1973.

HENRY L. DIAMOND,
Commissioner of Environmental Conservation of the State of New York.

To: VILLAGE OF CAMILLUS,
Attention: MORRIS RAICHLIN, Mayor,
Camillus, N. Y. 13031.

To: BOARD OF TRUSTEES OF THE VILLAGE OF CAMILLUS.
Attention: JANET KENNEDY, Village Clerk,
Camillus, N. Y. 13031.